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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA P. ROSALES,

Defendant and Appellant.

B210251

(Los Angeles County
Super. Ct. No. BA 308417)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Rand S. Rubin, Judge. Reversed.

Derek K. Kowata, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E.
Winters and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joshua P. Rosales timely appealed from his conviction on one count of second degree murder¹ and one count of grossly negligent discharge of a firearm. The jury found the firearm allegations to be true and the gang allegation to be not true. The court sentenced defendant to 40 years to life. Defendant contends the court erred in improperly instructed the jury on felony murder based on an unauthorized theory, in allowing two witnesses to testify after they invoked their Fifth Amendment privilege, and in excluding evidence the victim had two prior felony convictions. We reverse.

FACTUAL BACKGROUND

I. Prosecution Case

On August 25, 2006, at around 5:00 p.m., Albert Hernandez was inside his home near the intersection of Mariana Avenue and Folsom Street in Los Angeles when he heard gunshots. Hernandez looked out the window and saw a young man with facial hair on his upper lip and chin, wearing a hat, jeans and a dark shirt, riding a skateboard south on Mariana. Hernandez believed he saw the man place a gun in his waistband. Shortly thereafter, police arrived and found Pedro Flores had been shot and killed nearby.

Deputy Sheriff Richard Lopez arrived at the scene and recovered five expended shell casings from the street and videotape surveillance footage from Diana's Market which captured the incident taken from three camera angles. The videotape, which was played for the jury, showed appellant riding his skateboard in the area, then a brief confrontation with Flores, followed by appellant taking out a gun and firing it at Flores as Flores rode away on a bicycle. Flores died from a gunshot wound to the right buttock that traveled upward through the bowel, liver, stomach and right ventricle of the heart, fractured the left anterior second rib, and lodged in the chest.

¹ The prosecutor dismissed the first degree murder charge during deliberations after the jury indicated it agreed appellant committed murder but could not agree on the degree.

Pursuant to a search warrant, Lopez searched appellant's home and recovered a skateboard from appellant's room. Lopez also recovered a 9-millimeter Taurus pistol from a car parked in appellant's backyard. An expert firearms examiner determined the shell casings found at the scene and the bullet taken from Flores's body all came from the Taurus pistol recovered at appellant's residence. A criminalist determined that DNA samples taken from appellant matched DNA found on the Taurus pistol and magazine.

II. Defense Case

Appellant was 16 years old at the time he shot Flores. Prior to that time, appellant had been shot on three occasions, including once in the head and stomach in 2005 and once in the arm a short while later. Appellant believed that Flores, also known as "P-Dog" from the Stoners Trece Gang, was the person who shot him in the head. Appellant also believed Flores painted "187 P-Dog Stoners" next to appellant's moniker on the sidewalk next to appellant's house. Appellant understood that painting to mean Flores was going to murder him.

After being shot in the head, appellant could not think straight and experienced confusion and began stuttering. Appellant's mother recalled that after appellant had been shot in the head, he became fearful, panic stricken and paranoid, often sleeping in her room or the attic, where he once stayed for three days. Appellant began stuttering and mumbling and would forget what he was talking about in the middle of the conversation, had trouble understanding simple words and experienced hallucinations.

Appellant and his mother could not afford to move out of the neighborhood, and as a result, he joined the Lott Gang for protection.

On August 24 the day before the shooting, appellant, his girlfriend Susan Pernudi and their friend Francine Lopez went to Diana's Market to buy beer. They ran into Nestor Lopez and accompanied him to a house on Folsom Street a few doors down from the market. While appellant was on the porch of that house, Flores approached and

threatened to kill appellant. Flores had a gun. Flores wanted appellant to take a walk with him, but appellant was scared and refused to go with Flores.

The following day, appellant rode his skateboard to meet Susan near Diana's Market. When appellant left his house, he took a gun for protection. As appellant rode his skateboard looking for Susan, Flores rode by on his bicycle and threatened to kill appellant. Flores told appellant that he was not going to live long because Flores was going to kill him.

As Flores started to ride away on his bicycle, appellant thought Flores had a gun in his waistband and was going to turn around and kill appellant. In a moment of panic, appellant took his gun, pointed the gun down toward the street and fired five times, but he accidentally struck and killed Flores. Appellant stated he only intended to frighten, not kill, Flores so that Flores would leave him alone.

Dr. Ronald Fairbanks, a forensic psychologist, administered numerous psychological assessment tests to appellant and concluded appellant had the mental age of someone between eight and ten and described appellant as mentally retarded. Dr. Fairbanks diagnosed appellant as suffering from polysubstance abuse, attention deficit disorder, post-traumatic stress disorder with flashbacks, bipolar disorder, paranoid schizophrenia, and mental retardation. Dr. Fairbanks believed that at the time of the instant offense, appellant suffered from those same disorders.

III. Prosecution Rebuttal

Elizabeth Soto lived at 4141 Folsom Street with her sister Janet Contreras, who was Flores's girlfriend. Like Flores, Elizabeth's boyfriend Michael Haynie was from the Stoners Trece Gang. Flores and Haynie often came to the house.

On the day of the shooting, Elizabeth was at home with her sister, having just given birth to her and Flores's son. Elizabeth did not witness any of the events. Elizabeth did not recall if she had seen Nestor at the house that day, but she confirmed he

lived there at the time. Elizabeth did not recall the contents of her taped interview with Deputy Lopez and did not recognize her voice on the tape. Elizabeth did not recall calling Haynie on that day or telling him to leave appellant alone.

Ernestina Soto, the mother of Elizabeth and Janet, testified she rented the middle house at 4141 Folsom. On the day of the shooting, Nestor was at the house with two girls; Haynie was by his side. Ernestina recalled seeing another male there with a skateboard whom she identified at trial for the first time as appellant. Haynie was talking to appellant, who said, "I will be back, I'm going to get something." Flores was not present, but about 30 minutes later, while Ernestina was in the front yard, she saw Flores down the street leaving Carlos's house on his bicycle, and then she saw appellant shoot Flores.

Nestor testified he was not at 4141 Folsom Street on August 24 or 25 and did not live there at the time.

Haynie testified that on the day of the shooting, he was drunk and had an argument with Contreras at her house and then he went to Flores's house. Haynie did not see anyone on the porch or in the yard of Contreras's house when he left. Shortly thereafter, Haynie and Flores went to Carlos's house. Later, as Flores rode his bike from Carlos's house to Contreras's house, he was shot. Haynie did not know appellant and did not recognize him at trial.

Deputy Lopez testified that when he arrested appellant, appellant did not mention he was going to meet Susan or that he had plans to meet Susan near the market.

During a taped interview with Elizabeth, she told Deputy Lopez that when Flores left her house on the day of the shooting, he said he was going to Carlos's house and she called Haynie that day and told him to leave appellant alone because he was just a kid.

Ernestina told Deputy Lopez that Nestor was at 4141 Folsom on the day of the shooting with two girls; she also saw Haynie that day arguing with a male Hispanic in the front lawn area of the house. When the male Hispanic walked away from Haynie, he said "he'd be back and he'd bring something."

When Deputy Lopez interviewed appellant, appellant stated that previously when he was with Susan, Flores had a gun and threatened to kill him. Appellant said Flores shot at him a few months earlier, although court records showed Flores was in custody at that time.

Appellant never told Deputy Lopez that he was pointing the gun at the ground. Appellant said that after Flores had threatened him, he told Flores, “fuck you fool,” because he was “tried of this shit.” Appellant then stated he went to shoot Flores and just started shooting because if not, Flores would probably have come back and killed him. Appellant said he acted in self-defense.

DISCUSSION

I. Felony Murder Instruction

Appellant was convicted of second degree murder. The prosecutor argued two alternate theories for murder: (1) murder with malice aforethought (CALCRIM No. 520), and (2) second degree felony murder based on the charged felony of grossly negligent discharge of a firearm (CALCRIM No. 541A). CALCRIM No. 520 stated in part:

The defendant is charged in Count 1 with murder. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] [AND] [¶] 2. When the defendant acted, he had a state of mind called malice aforethought; [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The parties agree that under *People v. Chun* (2009) 45 Cal.4th 1172, 1178, 1200-1201, which was decided after the trial in this case, the court erred in instructing the jury on second degree murder based on an assaultive felony (grossly negligent discharge of a

firearm) as such felonies merge with the homicide. The parties disagree as to whether the error was harmless. Instructional error is harmless if the record demonstrates beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*Id.*, at p. 1203.) Such instructional error may also be found harmless beyond a reasonable doubt “[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the finding necessary” for implied malice or express malice. (*Id.*, at pp. 1204-1205.)

Respondent notes the verdicts do not necessarily show the jurors did not rely on a legally valid theory, i.e., the jurors could have found appellant was guilty of second degree murder based upon implied or express malice. Respondent then posits that the evidence, instructions and verdicts leave no reasonable doubt the jury made the findings necessary for a second degree murder verdict based upon implied malice and that no juror could have found appellant guilty based on a theory of felony murder without also finding he harbored implied malice. We disagree.

Pursuant to CALCRIM No. 520, the court instructed the jury that appellant acted with implied malice if: (1) he intentionally committed an act; (2) the natural consequences of the act were dangerous to human life; (3) at the time he acted, he knew his act was dangerous to human life; and (4) he deliberately acted with conscious disregard for human life.

As to the underlying felony, the court instructed the jury had to find: (1) appellant intentionally shot a firearm, (2) appellant did the shooting with gross negligence, and (3) the shooting could have resulted in the injury or death of a person. The instruction further instructed that “a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequence of that act.” (CALCRIM No. 970.)

However, “[t]he second degree felony-murder rule eliminates the need for the prosecution to establish the mental component [of conscious-disregard-for life malice].” (*Italics omitted.*) (*People v. Chun, supra*, 45 Cal.4th at p 1182.) In determining whether

a crime merges, the court looks to its elements and not the facts of the case. (*Id.*, at p.1200.)

Respondent notes that the only substantive difference between the elements for murder based on implied malice and murder based on felony murder is that gross negligent shooting does not require a defendant personally know his act was dangerous to human life, but only that a reasonable person would know shooting in such a manner would create a high risk of death or great bodily injury. Respondent asserts the evidence overwhelmingly showed appellant personally knew the shooting was dangerous to human life. Respondent then reasons that in order to have found appellant guilty of felony murder, the jury had to have found appellant harbored implied malice.

In *People v. Contreras* (1994) 26 Cal.App.4th 944, 954, the court discussed the distinction between gross negligence and implied malice: “Gross negligence was defined as the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. Implied malice requires proof the accused acted deliberately with conscious disregard for life. [¶] ‘Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence. [¶] . . . A finding of gross negligence is made by applying an objective test: if a reasonable person in defendant’s position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. However, a finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved, i.e., a subjective standard.’ [¶] It is the ““conscious disregard for human life”” that sets implied malice apart from gross negligence.” (Citations & italics omitted.)

In other words, if a juror found appellant guilty of second degree murder based on felony murder, he or she did not necessarily find appellant harbored implied malice. Any juror who relied on felony murder only had to find appellant shot with gross negligence. (Compare *People v. Hach* (2009) 176 Cal.App.4th 1450, 1456-1458 [The court concluded the error in instructing on felony murder was harmless because any juror who

relied on felony murder necessarily found the defendant willfully shot at an occupied vehicle, meaning he did so knowing of the danger and with conscious disregard for life. Penal Code section 246, the underlying felony, requires in part that the person “maliciously and willfully discharged a firearm.”].)

The jury was unable to agree appellant committed first degree murder and found the gang allegation to be not true. As the prosecutor argued, if the jury thought that appellant fired to scare rather than kill or that he shot at the ground and did not intent to kill, it should convict appellant of felony murder. Thus, there is reasonable doubt the jury made the finding necessary for a verdict based on malice. Hence, we reverse as instructing the jury on felony-murder was prejudicial. Consequently, we need not address the other issues raised by appellant.

DISPOSITION

The judgment is reversed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.